IN THE SUPREME COURT OF IOWA

No. 15-0741

JASON CANNON

Appellant,

VS.

BODENSTEINER IMPLEMENT COMPANY,
ECK & GLASS, INC. d/b/a EPG INSURANCE, INC.
and CNH AMERICA LLC, d/b/a CASE IH

Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CLAYTON COUNTY
THE HONORABLE JOHN BAUERCAMPER

APPELLANT'S FINAL BRIEF

JUDITH O'DONOHOE - AT0005849
ELWOOD, O'DONOHOE,
BRAUN, WHITE, LLP
116 North Main Street, P.O. Box 307
Charles City, IA 50616
(641) 228-8054
(641) 228-8057 - Fax
charlescity@elwoodlawfirm.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING

I, Judith O'Donohoe, hereby certify that I filed the attached Appellant's Final Brief by Electronic document filing on the 16th day of November, 2015, addressed to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 4th Floor, 1111 East Court Avenue, Des Moines, Iowa 50319.

___s/Judith O'Donohoe_____
Judith M. O'Donohoe #AT0005849

CERTIFICATE OF SERVICE

I, Judith O'Donohoe, hereby certify that on the 16th day of November, 2015, I served the attached Appellant's Final Brief by electronic document filing on counsel for the Appellees.

____s/Judith O'Donohoe_____
Judith M. O'Donohoe #AT0005849

CERTIFICATE OF COST

I, Judith O'Donohoe, certify that the costs of producing the Appellant's Final Brief was $7.30.

____s/Judith O'Donohoe_____
Judith M. O'Donohoe #AT0005849

TABLE OF CONTENTS

CERTIFICATE OF FILING. i

CERTIFICATE OF SERVICE. i

CERTIFICATE OF COSTS. i

TABLE OF AUTHORITIES. .....

STATEMENT OF ISSUES. 1

ROUTING STATEMENT. 7

STATEMENT OF THE CASE. 7

STATEMENT OF FACTS. 10

Facts related to claims against Bodensteiner. 11
Per Cannon. 11
Per Bodensteiner. 17

Facts related to claims against EPG. 19
Per Cannon. 19
Per EPG. 20

Facts related to claims against Case. 21
Per Cannon. 21
Per Case. 26

ARGUMENT. 26

I. Did the Court err in awarding summary judgment to Bodensteiner on claims of fraudulent misrepresentation/fraudulent non-disclosure, breach of express and implied warranties, breach of implied covenant of good faith and fair dealing and for the remedy of equitable rescission? 26

Scope of Review/Preservation of the Issue. 26

Discussion. 27

A. Fraudulent Misrepresentation/Fraudulent Non-disclosure. 27

B. Breach of Express Warranty/Implied Warranties of Merchantability and Fitness for a Particular Purpose. 31

C. Breach of Implied Covenant of Good Faith and Fair Dealing. 34

D. Claim for Equitable Rescission. 35

II. Did the Court err in awarding summary judgment to EPG on claims of breach of contract? 38

Scope of Review/Preservation of the Issue. 38

Discussion. 38

A. Re: EPG's liablity for outstanding expenses unsubmitted and unpaid. 38

B. As to EPG's liability for failure to effectuate repairs. 40

III. Did the Court err in awarding summary judgment to Case on claims of negligent design, manufacture etc, breach of express warranty and fraudulent concealment/nondisclosure? 44

Scope of Review/Preservation of the Issue. 44

Discussion. 44

A. Whether the economic loss doctrine should apply to eliminate the negligence claim. 44

B. Whether Case is responsible for the repair warranty encompassed in the "Case IH Commercial Equipment Purchase Protection Plan" and if so, whether it fails of its essential purpose and opens Case to liability for Cannon's damages. 51

C. Whether summary judgment should have been granted on the claim for fraudulent concealment/fraudulent nondisclosure by Case. 58

CONCLUSION. 62

REQUEST FOR ORAL ARGUMENT. 62

CERTIFICATE OF COMPLIANCE. 63

TABLE OF AUTHORITIES

Cases: **Page**

AFM Corp v Southern Bell Telephone & Telegraph Co, 515 So2d 180,181(Fla. 1987) 46

Annett Holdings Inc v Kum & Go, 801 NW2d 499, 508-513(IA 2011) 45,50

Bauman v Nutter, 328 NW2d 354,357(IA 1982) 41

Beck v Capalis, 302 NW2d 90(IA 1991) 27

Bitner v Ottumwa Community School Dist, 549 NW2d 295,302(IA 1996) 37

Bob McKiness Excavating & Grading Inc v Morton Buildings, 507 NW2d 405, 409 (IA 1993) 58

Brandt v Boston Scientific Corp, 792 NE2d 296(IL 2003) 42

Bruce v ICI Americas Inc, 933 FSupp 781 (S.D. IA 1996) 32

Bushman v Cuckler Bld, 421 NW2d 145(IA App 1988) 47

Campbell v Agfinder Iowa-Nebraska, 683 NW2d 126(Table)(IA App 2004)..... 36

C & J Fertilizer v Allied, 227 NW2d 169(IA 1975) 36

Chariton Feed and Grain Inc v Harder, 369 NW2d 777,789-90(IA 1985) 54

City of Ottumwa v Poole, 687 NW2d 266(IA 2004) 35

Clark v McDaniel, 546 NW2d 590,592-4(IA 1996) 60

Clark v International Harvestor Co, 581 P2d 784(ID 1978) 57

Clinkscales v Nelson Sec. Inc, 697 NW2d 836,841(IA 2005) 10,27

Cooley v Bighorn Harvestor Systems Inc, 812 P2d 736(CO 1991) 57

Coryell v Lombard Lincoln-Mercury Merkur Inc, 544 NE2d 1154(Ill App 2nd distr 1989) 41

Christy v Miulli, 692 NW2d 694 (IA 2005) 60

Design Data Corp v Maryland Casualty Co, 503 NW2d 552(NE 1993) 42

Estate of Anderson v Iowa Dermatology Clinic PLC, 819 NW2d 408(IA 2012) 60

Farm Bureau Service Company of Harden County v Bavender, 217 NW2d 560,562(IA 1974) 52

Farm-Fuel Products Corp v Grain Processing Corporation, 429 NW2d 153,156(IA 1988) 53

Gacke v Pork Xtra LLC, 684 NW2d 168,172-4(IA 2004) 48,49

Giarratano v Mitas Muffler, 166 Misc.2d 390, 630 N.Y.S.2d 656(NY 1995) 41

Gillette Dairy Inc v Hydrotex Indus. Inc, 440 F.2d 969,974(8th Cir 1971) 32

Goddard v General Motors Corp, 396 NE2d 76(OH 1979) 57

Hammen v Iles, 834 NW2d 872, 2013 WL2368810 (IA App) 60

Harold v Shagnasty's Inc, 690 NW2d 699(Table)(IA App 2004) 53

Harrison v Rockwell Collins Inc, 2006 WL2981451(N.D. IA) 54

Hydronic Energy v Rentzel Pump, 2013 WL5797326 (NE App) 57

Iverson v Johnson Gas Appliance Co, 172 F3d 524,530(8th Cir 1999) 37

Jacobson v Benson Motors Inc, 216 NW2d 316(IA 1974) 31

Keith E. Meyers Enterprises, 296 NW2d 772(IA 1980) 32

Kreiscrs Inc v First Dakota Title Limited Partnership, 852 NW2d 413,421-2(S.D. 2014) 47

Limited Flying Club Inc v Wood, 632 F2d 51(8th Cir (Iowa 1980)) 31

Manning v International Harvester Company, 381 NW2d 376(IA 1985) 46

May's Drug Stores v State Tax Commission, 45 NW2d 245,328-9(IA 1951) 48

McLeod USA v Quest Corp, 469 FSupp2d 677 (ND IA 2007) 61

Midwest Hatchery & Poultry Farms Inc v Doorenbos Poultry Inc, 783 NW2d 56(IA 2010) 36,57

National Assurity Corp v Dustex Corp, 291 FRD 321(N.D. IA 2013) 37

Nelson v Todd's Ltd, 426 NW2d 120 (IA 1988) 47

Peak v Adams, 799 NW2d 535(IA 2011) 54

Peters v Lyons, 168 NW2d 759,763(IA 1969) 32

Richards v Midland Brick Sales Co Inc, 551 NW2d 649(IA App 1996) 42,45,47

Rinehart v Morton Buildings Inc, 305 P3d 622,626(KA 2013) 46

RMP Industries Ltd v Linen Center Center, 366 NW2d 523,528(IA App 1986) 42

Saratoga Fishing Company v J.M. Martinac & Company, 520 U.S. 875,884(1997) 45

SDG Macerich Properties LP v Stanek Inc, 648 NW2d 581(IA 2002) 36

Seely v White Motor Co, 403 P2d 145,149(CA 1965) 45

Select Pork Inc v. Babcock Swine Inc, 640 F2d 147 (8th Cir 1981) 57

Sharp v Tamko Roofing Products Inc, 695 NW2d 43(Table)(IA App 2004) 34

Smith v Iowa Liquor Commission, 169 NW2d 803,811(IA 1969) 41

St. Malachy Roman Catholic Congregation of Geneseo v Ingram, 841 NW2d 338,351(IA 2014) 44

Stoner v Iowa State Highway Commission, 287 NW 269(IA 1939) 48

Stream v Sportscar Salon Ltd, 91 Misc 2d 99, 397 N.Y.S.2d 677(NY 1977) .. 32,43

Sullivan v Pulte Home Corp, 306 P3d 1,2(AZ 2013) 46

Team Two Inc v City of Des Moines, 334 NW2d 82(Table)(IA App 2013) 35

Thakur LLC v Maha-Vishna Corp, 826 NW2d 515(Table)(IA App 2012) 35

Tilot Oil LLC vs BP Products of N.A., 907 FSupp.2d 955(E.D. Wis 2012) 47

Tomka v Hoechst Celanese Corp, 598 NW2d 103, 106-7(IA 1995) 46,47

Tralon Corporation v Cedar Rapids, Inc, 966 F.Supp 812 (N.D. IA 1997) 32

Turner v Kunde, 128 NW2d, 196,198(IA 1964) 32

U.S. ex rel Bernard v Casino Magic Corp, 293 F3d 419,426(8th Cir 2002) 37

VanWyk v Norden Laboratories Inc, 345 NW2d 81(IA 1984) 33

Waterhout v Associated Drygoods Inc, 835 F.2d 718,720(8th Cir MO 1987) 54

Wright v Brooke Group Limited, 652 NW2d 159, 174-6 (IA 2002) 58

Young v Hessel Tractor, 782 P2d 164(OR App 1989) 57

Other

30 AmJur, *Joint Adventure*, §1112. 52

48 C.J.S. *Joint Adventures*, §2a..... 52

Applying Economic Loss Doctrine to Article 2 Transactions: A doctrine at a loss, St. Thomas Law Review, Fall 2012..... 50

Article I, §1 Iowa Constitution..... 47,49,50

Due Process Clause of the U.S. Constitution, the 14th Amendment §1..... 48,50

I.R.Civ.P. 1.981(3) 27

Restatement 2nd *Agency* §7(1958) 41

Restatement of Torts §550. 59

Restatement of Torts §551. 27,58

Restatement 2nd of *Torts*, §526(1977) 27

Restatement 2nd of *Torts*, §527(1977) 27

Restatement 2nd of *Torts*, §529(1977) 27

Restatement of 2nd Torts §533. 60

Restatement 2nd of *Torts*§551(1977) 27

The Boundary-Line Function of the 'Economic Loss Rule', 66 Wash & Lee L.R., 523 (Spring 2009) 47

UCC §554.1201..... 33

UCC §554.1304..... 34

UCC §554.2103..... 34

UCC §554.2104(1) 43

UCC §554.2207..... 32

UCC §554.2313..... 31

UCC §554.2314..... 33

UCC §554.2315..... 33

UCC §554.2316..... 33

UCC §554.2608..... 36

UCC §554.2719..... 7,36,42,56

STATEMENT OF ISSUES

I. Did the Court err in awarding summary judgment to Bodensteiner on claims of fraudulent misrepresentation/fraudulent non-disclosure, breach of express and implied warranties, breach of implied covenant of good faith and fair dealing and for the remedy of equitable rescission?

I.R.Civ.P. 1.981(3)

Clinkscales v Nelson Sec. Inc, 697 NW2d 836,841(IA 2005)

Beck v Capalis, 302 NW2d 90(IA 1991)

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Restatement 2nd of *Torts*, §527(1977)

Restatement 2nd of *Torts*, §529(1977)

Restatement 2nd of *Torts*§551(1977)

UCC §554.2313

Jacobson v Benson Motors Inc, 216 NW2d 316(IA 1974)

Limited Flying Club Inc v Wood, 632 F2d 51(8th Cir (Iowa 1980))

Stream v Sportscar Salon Ltd, 91 Misc2d 99 (NY 1997)

UCC §554.2207

Turner v Kunde, 128 NW2d, 196,198(IA 1964)

Bruce v ICI Americas Inc, 933 FSupp 781 (S.D. IA 1996)

Keith E. Meyers Enterprises, 296 NW2d 772(IA 1980)

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Tralon Corporation v Cedar Rapids, Inc, 966 F.Supp 812 (N.D. IA 1997)

Gillette Dairy Inc v Hydrotex Indus. Inc, 440 F.2d 969,974(8th Cir 1971)

UCC §554.2314

UCC §554.2316

VanWyk v Norden Laboratories Inc, 345 NW2d 81,84(IA 1984)

UCC §554.2315

Sharp v Tamko Roofing Products Inc, 695 NW2d 43(Table)(IA App 2004)

UCC §554.1304,

UCC §554.2103

UCC §554.1201

Team Two Inc v City of Des Moines, 334 NW2d 82(Table)(IA App 2013)

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Campbell v Agfinder Iowa-Nebraska, 683 NW2d 126(Table)(IA App 2004)

C&J Fertilizer v Allied, 227 NW2d 169(IA 1975)

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Midwest Hatchery & Poultry Farms Inc v Doorenbos Poultry Inc, 783 NW2d 56(IA 2010)

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U.S. ex rel Bernard v Casino Magic Corp, 293 F3d 419,426(8th Cir 2002)

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Issue II: Did the Court err in awarding summary judgment to EPG on claims of breach of contract?

Bauman v Nutter, 328 NW2d 354,357(IA 1982)

Restatement 2nd *Agency* §7(1958)

Smith v Iowa Liquor Commission, 169 NW2d 803,811(IA 1969)

Coryell v Lombard Lincoln-Mercury Merkur Inc, 544 NE2d 1154(Ill App 2nd distr 1989)

Giarratano v Mitas Muffler, 166 Misc.2d 390, 630 N.Y.S.2d 656(NY 1995)

UCC §2-719(2)

UCC §554.2719

Design Data Corp v Maryland Casualty Co, 503 NW2d 552(NE 1993)

Brandt v Boston Scientific Corp, 792 NE2d 296(IL 2003)

RMP Industries Ltd v Linen Center Center, 366 NW2d 523,528(IA App 1986)

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Issue III: Did the Court err in awarding summary judgment to Case on claims of negligent design, manufacture etc, breach of express warranty and fraudulent concealment/nondisclosure?

St. Malachy Roman Catholic Congregation of Geneseo v Ingram, 841 NW2d 338,351(IA 2014)

Annette Holdings Inc v Come & Go, LC, 801 NW2d 499,503-4(IA 2011)

Saratoga Fishing Company v J.M. Martinac & Company, 520 U.S. 875,884(1997)

Seely v White Motor Co, 403 P2d 145,149(CA 1965)

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Tomka v Hoechst Celanese Corp, 598 NW2d 103, 106-7(IA 1995)

Manning v International Harvester Company, 381 NW2d 376(IA 1985)

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AFM Corp v Southern Bell Telephone & Telegraph Co, 515 So2d 180,181(Fla. 1987)

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The Boundary-Line Function of the 'Economic Loss Rule', 66 Wash & Lee L.R., 523 (Spring 2009)

Nelson v Todd's Ltd, 426 NW2d 120 (IA 1988)

Bushman v Cuckler Bld, 421 NW2d 145(IA App 1988)

Richards v Midland Brick Sales Company Inc, 551 NW2d 649(IA 1996)

Tomka v Hoechst Celanese, 528 NW2d 103(IA 1995)

Article I, §1 Iowa Constitution

May's Drug Stores v State Tax Commission, 45 NW2d 245,328-9(IA 1951)

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Stoner v Iowa State Highway Commission, 287 NW 269(IA 1939)

Gacke v Pork Xtra LLC, 684 NW2d 168,172-4(IA 2004)

Annette Holdings Inc v Kum & Go, 801 NW2d 499, 508-513(IA 2011)

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Chariton Feed and Grain Inc v Harder, 369 NW2d 777,789-90(IA 1985)

Waterhout v Associated Drygoods Inc, 835 F.2d 718,720(8th Cir MO 1987)

Harrison v Rockwell Collins Inc, 2006 WL2981451(N.D. IA)

Peak v Adams, 799 NW2d 535(IA 2011)

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Midwest Hatchery & Poultry Inc v Doorenbos Poultry Inc, 783 NW2d 56 (IA App 2010)

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Restatement 2nd Torts §551

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Restatement of Torts §551

Restatement of 2nd Torts §533

Clark v McDaniel, 546 NW2d 590,592-4(IA 1996)

Hammen v Iles, 834 NW2d 872, 2013 WL2368810 (IA App)

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Christy v Miulli, 692 NW2d 694 (IA 2005)

McLeod USA v Quest Corp, 469 FSupp2d 677 (ND IA 2007)

ROUTING STATEMENT

Per Rule 6.1101(2) the Supreme Court should retain this case under subsection "a" because it presents the substantial constitutional question of whether the court created economic loss doctrine as applied to those not in contractual privity to foreclose negligence actions violates the Iowa and U.S. Constitutions. Further, under subsection "c" it presents a substantial issue of first impression as it relates to the scope and applicability of §554.2719 to void contractual limitations when the limited remedy fails of its essential purpose.

STATEMENT OF THE CASE

When the pleadings were complete, Jason Cannon (Cannon) had brought claims against three defendants, who are the subject of this appeal [1].

Bodensteiner Implement Company (Bodensteiner), with branches at a number of locations including Clermont and Monticello, is a John Deere dealership and deals in used farm equipment from other manufacturers. It was sued in the original petition, 4/22/13 for fraudulent misrepresentation,

[1] A fourth defendant, Windridge Implements, LLC, (Windridge) was sued in the original petition filed 4/22/13 for breach of contract in Count II. This case was settled and is not a subject for appeal.

Count I in the recast pleadings filed 1/22/15. On 12/23/13 a cause of action for breach of implied warranties was added in the first amendment to the amended and substituted petition, Count IV in the recast pleadings. Also added 12/23/13 was a claim for breach of implied covenant of good faith and fair dealing, Count V of the recast pleadings. A count for equitable rescission was added 12/23/13, Count VI of the recast pleadings.[2] (Vol I - App83).

On 11/3/2014, Bodensteiner filed a motion for summary judgment, which was subsequently resisted by Cannon on 1/23/2015(Vol I-App437-654). Cannon asked for an extension on the ruling to allow more time for discovery on 1/28/2015(Vol I-App103). On 3/30/15, the court granted summary judgment on all claims(Vol I-App136-144).

A claim was brought against ECK & Glass, Inc. d/b/a EPG Insurance, Inc. (EPG) in a second amendment to the amended and substituted petition filed on 12/23/13 for breach of contract. This pleadings was subsequently amended on 11/3/14 to specifically state that the extended purchase plan/warranty administered by EPG failed of its essential purpose since the tractor purchased by Cannon was a lemon and unrepairable (Vol I-App47). EPG filed a motion for summary judgment 11/6/14. This was resisted by

[2] A cause of action for negligent misrepresentation was also brought but subsequently dismissed on 1/22/15.

Cannon on 1/23/2015. EPG replied to the resistance on 2/5/15(Vol II-App655). The motion was granted by the court on 3/30/15(Vol I-App136-144).

Three causes of action were brought against CNH America LLC d/b/a Case IH (Case) in the second amendment to the amended and substituted petition filed 12/23/13[3](Vol I-App54). The causes of action ruled on were breach of negligent design, duties of negligent design manufacture, assembly and warning, recast petition and Count VIII, breach of implied warranty of merchantability,(Vol I-App83). On 11/3/14, in a third amendment to the amended and substituted petition added two counts, breach of express warranty and fraudulent concealment/fraudulent nondisclosure(Vol I-App83). Case filed its first motion for summary judgment on 7/31/14 regarding Counts VIII and X. It was resisted by Cannon on 10/31/2014(Vol I-App147-436). Following the amendments adding Counts 11 and 12, Case filed a supplemental motion for summary judgment on 1/23/2015. This was resisted by Cannon on 3/16/2015(Vol I-App808-897). Simultaneously, Cannon requested a conditional postponement of the motion for summary judgment to allow for more discovery(Vol I-App103). On 3/30/2015 Judge Bauercamper dismissed all causes of action against Case(Vol I-App136).

[3] One of these causes of action, Count IX for negligent misrepresentation was dismissed on 11/3/14.

As of 3/30/2015, all claims of Cannon arising out of his acquisition of the lemon Case IH 305 four-wheel drive tractor had been dismissed by the court except the claim against the Windridge, this claim was dismissed with prejudice as well as the counterclaim against Cannon on 4/27/2015 and 4/24/2015 respectively(Dismissals).

A notice of appeal was filed 5/1/2015(Vol I-App145).

STATEMENT OF THE FACTS

Since all claims were disposed of by summary judgment, the court in making a determination on these claims is required to view the evidence in the light most favorable to Cannon, Thompson v Kaczinski, NW2d 774, 829-831(IA 2009), Clinkscales v Nelson, Sec. Inc, 697 NW2d 836,841(IA 2005). Further, if there is a dispute of fact which requires a credibility judgment, the court must refrain from doing so and assume the truth of the facts asserted by the non-moving party. Even when the facts are not in dispute the non-moving party is entitled to every legitimate inference the record will bear in its favor, Frontier Leasing Corporation v Links Engineering, LLC, 781 NW2d 772,775-6(IA 2010).

Facts related to claims against Bodensteiner

Per Cannon

Cannon was an independent contractor for D & J Pumping tasked with hauling manure in tanks and spreading spreading it in fields(Vol I-App567,619). Before 2008, when Cannon obtained his John Deere 8430 from Bodensteiner Implement, he had heard of a Case tractor model, Magnum 305 from another dealer, Mark Baumler, but elected to go with the John Deere 8430 sold to him by salesman, Roger Monroe(Vol 1-App571). Cannon had no specific information from his co-manure haulers, the Mitchells about the Case Magnum 305. They owned other models of Case tractors(Vol I-App622,630-631,637). Other manure haulers for D & J Pumping used tractors made by Ford, New Holland, AGCO, and John Deere(Vol I-App571-2,630-631).

Cannon had a long-standing relationship with Monroe. All three of the large tractors that he purchased during his lifetime were with the assistance of Monroe. He consulted Monroe: 1)when he made a private purchase of a John Deere tractor; 2)when he purchased the John Deere 8430 from Bodensteiners; and 3)in connection with the purchase of the Case 305 from Bodensteiners(Vol I-App583-585,537). When Cannon called and spoke to Monroe about a Case tractor, he asked for a Case 285(Vol I-App585,621,

628,636). Monroe called Cannon back the next day and indicated he had a Case Magnum 305 available instead at Bodensteiner's dealership in Monticello(Vol I-App585,636); he stated the Case 305 was in the shop, had been gone through and was ready to go(Vol I-App586,637). Monroe advised Cannon that the previous owner had used it for manure hauling and he had no issues with the tractor(Vol I-App587).

Bodensteiner's mechanic at the Clermont dealership, Neil, said that the tractor was a good tractor and that Cannon would be happy with what he was getting including the horsepower(Vol I-556); Monroe advised Cannon that he knew of the Case Magnum 305 and it was a good tractor(Vol I-App546).

Monroe stated that he would not have the tractor trucked up from Monticello to the Clermont dealership for Cannon unless he agreed to purchase it in advance. The purchase price was to be $139,000, $1,000 cash and the balance in trade-in of his 8430 John Deere tractor, which needed a head gasket, and would be down for three weeks with a repair, which was covered by his warranty(Vol I-App545,586,588,613,615,637-638). The day of delivery of the tractor, 10/6/2010, Monroe told Cannon that the Case 305 Magnum tractor had been in the shop and everything tested out(Vol I-App586). Monroe also told Cannon that the tractor was ready to go for

manure hauling. Cannon found out later that it was not(Vol I-545,558). Monroe claims he drove the Case 305 when it arrived at the dealership 10/6/10 before calling Cannon(Vol I-App592).

As a salesman, Monroe indicated that he had experience with tractors and their use for manure hauling and had sold tractors to other manure haulers(Vol I-App597-601,604-605). His responsibility, as a salesman, included an inspection of the tractor with the aid of a mechanic before taking it in on trade. He also routinely runs the tractor and asks the owner questions about how it has worked(Vol I-App600-601). Before reselling a tractor, the tractor is inspected by the mechanic and serviced at the dealership(Vol I-App601-604).

Monroe acknowledged that he has known Cannon for a long time through previous transactions and that Cannon asked him whether the Case 305 tractor was appropriate for manure hauling(Vol I-App605-606). Monroe spoke to the Monticello dealership salesman, Phil Kluesner, who took the Case 305 tractor in on trade from Gansen Pumping. Kluesner told him that it was a good tractor, it had been used satisfactorily for manure pumping, it passed inspection at the Monticello dealership, and had been driven satisfactorily(Vol I-App606-612). This information was passed onto Cannon by Monroe who acknowledged that he told Cannon the tractor was in good

condition(Vol I-App592). Based on the information provided to Cannon and the fact that they did a thorough inspection of Cannon's John Deere tractor before they accepted it on trade, Cannon believed that the Case 305 would have been well inspected before it sold to him(Vol I-App585).

Cannon's test drive of the tractor occurred after he picked it up from the Clermont dealership and had traded in his tractor and paid $1,000. He drove it ten miles to his home(Vol I-App544,608-609). Bodensteiner used a form that he had for purchase of John Deere equipment to memorialize the sale upon delivery of the tractor. The purchase form, which is attached to the affidavit of Monroe submitted by Bodensteiner, stated that the purchaser had already accepted the tractor. It did not provide an option to refuse it. Cannon believed that he had to accept the tractor before it was trucked up to the Clermont dealership(Vol I-App586-588,609). The information on the front of the purchase form appeared to be a disclaimer of warranties as it related to John Deere products but did not speak directly to the issue of the Case 305 tractor (App495-499). Cannon relied on Roger Monroe's superior knowledge of tractors and their use in the manure hauling business to help him locate a tractor that would be satisfactory. He was not just looking for a model that might be satisfactory but a specific tractor that was satisfactory and this was known to Monroe who false made representations about the

specific tractor; its appropriateness and adequacy(Vol I-App536,545,558, 637). Although the purchase form specifically references "Case Warranty", it was signed by Monroe and Cannon on 10/6/10, it was not actually signed and accepted by the dealership until 10/11/2010(Vol I-App609-610).

On 10/6/2010, after Cannon drove the tractor home and hooked it up to a tank, he noticed it did not have enough pulling power, even with his empty tank. He then identified that the problem was with the turbo. At the time this occurred on 10/6/10, he spoke to Monroe, who told him perhaps the filters were clogged and he should check them out. In fact, he observed 12 turbo bolts were broken and rusted. This condition had existed for quite some time before the tractor was delivered to Cannon and should have been known to Bodensteiner if it had conducted an inspection(Vol I-App547,552, 568-569,578).

After hooking up and starting his work still on 10/6/2010, 19th gear went out of the tractor(Vol I-App552). Then, the hydraulic pump exploded(Vol I-App546,632,637). Cannon asked Monroe, within a day or two of taking delivery of the tractor, for a loaner while the Case 305 was being repaired under warranty by Windridge. Roger said that this was not possible(Vol I-App637-638). Shortly after 10/6/2010, the transmission overheated and the brakes failed. Unknown to Cannon, this had been a

recurrent problem for the previous owner, Gansen Pumping(Vol I-App553, 578).

At first, Cannon believed that the tractor was fixable(Vol I-App543). After a series of repairs and re-occurrences, it was clear that the problem was not fixable(Vol I-App637-638). Monroe agreed that the amount of repairs required for the brakes up through the last repair in 2012 was excessive(Vol I-App611).

Cannon does not think that any inspections were done by Bodensteiner or some of the problems he experienced would have been noticed(Vol I-App574). After the repeated problems with the transmission overheating and the brakes failing, Cannon talked to Schermann's Implement's service manager, who had serviced the tractor when it was owned by Gansen Pumping. He told Cannon that the first time the brakes went out on Gansen, they thought it was possible operator misuse, but when they went out again, they decided it was an inherent problem with the tractor(Vol I-App576-577,633).

After taking delivery from Windridge of the tractor following extensive repairs, the brakes failed almost immediately and the tractor had to be parked as Windridge indicated it had no further idea as to how to fix the problem(Vol I-App575). Since the tractor is unrepairable, Cannon wants to

revoke acceptance of it and receive a refund of his original purchase price(Vol I-App637-638). There is no evidence that Bodensteiner used the tractor or that anyone else offered to buy the tractor after it was traded in by Gansen Pumping in March 2010 and before it was sold to Cannon in October 2010(Vol I-App495-499,531-532).

Per Bodensteiner

In the affidavit of Roger Moore he indicates that there was a trade of Cannon's JD 8430 tractor in exchange for the Case IH 305 tractor on 10/6/10 and that $1,000 was paid by Cannon for transporting the tractor from Monticello dealership to the Clermont dealership. He indicates the information he provided Cannon was the model, year, hours, tire condition and that statement that it was ready for sale, all before the tractor was trucked up to Clermont. Further he states he gave no warranties and advised Cannon that the tractor had an extended warranty on it but that no warranty was given by Bodensteiner. He also indicates that he saw no operational problems with the tractor and that when he was talking to the personnel at the Monticello dealership no one communicated to him any knowledge of any defects(Vol I-App495-496). Limited excerpts were taken from Cannon's depositions and presented by the affidavit of attorney Arenz. The deposition excerpts were preceded by conclusory statements, some but not

all of which were partially reflected in the deposition excerpts. The conclusions drawn were as follows:

1. Cannon relied on his friends to decide to purchase the Case 305 tractor(Vol I-App463-470);

2. Cannon was in hurry to buy the tractor because his tractor failed during the busy season(Vol I-App471);

3. Cannon had an opportunity to test drive the tractor but declined to do so(Vol I-App474);

4. The Case 305 make and model were appropriate for manure hauling in general(Vol I-App475-480);

5. Cannon knowingly signed the purchase agreement(Vol I-App481);

6. The only warranty on the tractor was the Case extended warranty(Vol I-App482-483);

7. The extended warranty effectively transferred to Cannon(Vol I-App484-485);

8. Bodensteiner made no false representations about the particular tractor only that the make and model generally would have performed as required and further that Cannon had no specific reason to believe that Roger Monroe was not acting in good faith(Vol I-App486-488);

9. Bodensteiner acted in good faith(Vol I-App489-490);

10. Cannon's ongoing tractor problem was the overheating of the transmission and failure of the brakes. Other problems he encountered were fixed(Vol I-App491-494);

Facts related to claims against EPG

Per Cannon

Upon the initial sale of the Case 305, a purchase protection plan covering the powertrain was obtained through Case IH from EPG. The extended protection plan covered the powertrain from 4/21/2010 through 4/20/2013(Vol II-App760-764). The 2008 Case 305 Magnum tractor, which is the subject of this lawsuit was traded to the Bodensteiner dealership in Monticello, Iowa, on or about 3/24/2010(Vol II-App747). The tractor was purchased used by Cannon on 10/6/2010. Accordingly, Cannon was the only owner who utilized the extended protection plan for the powertrain. The extended protection plan for the powertrain extended coverage for repairs up to $150,000 during the period of 4/21/10 through 4/20/13(Vol II-App748). EPG has only paid $38,785.16 as of 1/17/2012, when it last paid for a repair. After this the tractor's brakes failed right away and the tractor was deemed unrepairable. The amount left on the plan that could be paid is $111,214.84 (Vol II-App756). The purpose of the extended protection plan failed of its essential purpose since the tractor was unrepairable. All the parts had been

replaced except for the motor and the brakes and transmission were still overheating and breaking down(Vol II-App747-754). All claims for repair under this extended protection plan were submitted to EPG by Windridge. Cannon was unaware of what entity processed the claims(Vol II-App771). He is still unpaid for $6,000 of expenditures made 1/6/2011 for the tractor which he believed should have been covered and reimbursed under the plan(Vol II-App775). He thinks EPG is the administrator of the two-year bumper-to-bumper, the base warranty and this extended warranty on behalf of Case as it paid for $4,635.12 of repairs to Scherrman's Implement under the base warranty on 12/8/09(Vol II-App755) as well as subsequent payments under the extended protection plan(Vol II-App764).

Per EPG

EPG believes that the tractor could possibly be repairable because Ryan Hillen from Case IH was working on a plan to try to get Case IH engineers to make further suggestions and this effort was discontinued upon receipt from Cannon's attorney threatening a lawsuit(Vol II-App788-789). Further there were no amounts due and owing on the claims submitted by Windridge under the extended warranty plan as of that date(Vol II-App671). The expenses Cannon claims as not being reimbursed were not submitted to EPG for a payment by Windridge(Vol II-App673).

Facts related to claims against Case

Per Cannon

Case manufactured a 2008 Case IH 305 MX Magnun tractor serial number Z8RZ02496 and sold it to Gansen Pumping on 4/21/2008(Vol I-App430). The tractor, at the time of its purchase, was covered by a two-year bumper-to-bumper warranty plan from the manufacturer, warranting the quality of the tractor and covering any and all defects(Vol I-App295,310, 430). This warranty extended from 4/21/2008 to 4/21/2010 (Vol I-App304; Vol II-App814). At the time of initial purchase, Gansen Pumping purchased the Case IH Commercial Equipment Purchase Protection Plan for the powertrain(Vol I-App430,435; Vol II-816). This protection plan was limited to 60 months or 5,000 hours, including the manufacturer's base warranty period, whichever occurred first. The tractor and the purchase protection plan were sold to Gansen Pumping through the Case IH dealership, Scherrman's Implement of Dyersville, Iowa(Vol I-App430-435). While the tractor was still under the manufacturer's base warranty period, it manifested a problem with the transmission overheating/malfunctioning causing damage to the brakes which then malfunctioned(Vol I-351-392). One or more aspects of this problem manifested itself on 10/7/2008, 11/24/2008,

10/21/2009, 10/24/2009, 11/13/2009; the brakes were replaced on 12/20/2008, 1/29/2009, 10/21/2009, and 11/13/2009(Vol I-App351-385).

Case's field service operator, Ryan Hillen, testified Brandon Kolb was the field service operator through May or June of 2011. The field service operator's job is to trouble-shoot repairs of Case equipment under both the base warranty and extended protection plans and make recommendations regarding such repairs. Kolb was aware of the problems and provided repair input advice to Schermann's Implement in the time frame of 10/7/2008 through 10/21/2009(Vol I-App304,306-311). Initially, Schermann's thought the overheating problem might be a result of operator misuse; however, it subsequently decided that it was a defect in the product(Vol I-App576-577,633). Kolb was specifically contacted by Schermann's Implement between 10/24/2009, and 11/3/2009, regarding the repeated failure of the brake system. Extensive testing was conducted under his direction using "ASIST", a troubleshooting branch of Case which oversees repairs for problematic equipment(Vol I-App310,325-329,340-350,377). Kolb became Hillen's manager when Hillen took over the field service operator's job in 2011 and remained in the loop regarding ongoing problems with this tractor (Vol I-App326-327).

The extended protection plan, covering the powertrain is entitled "Case IH Commercial Equipment Purchase Protection Plan". Although the contract provider was EPG Insurance, the form, nature and extent of the protection plan was dictated by Case IH(Vol I-App430-435). Additionally, Case's promotional material included information about the availability of the extended purchase protection plans on its equipment as an inducement for potential buyers (Vol II-App873). Although this literature is from a later publication in 2013 re: Case Magnum tractors, nothing of record disputes that this was not the situation in 2008. Case filed no affidavits in support of its motions. EPG's materials show that it paid for repairs during the base two-year bumper-to-bumper warranty(Vol II-App755). Further the extended powertrain coverage certificate refers to EPG Insurance Inc only as an administrator(Vol II-App748).

Gansen Pumping traded the tractor to Bodensteiner's Monticello dealership on 3/24/2010(Vol I-App280) and ultimately sold it to Cannon from its Clermont dealership on 10/6/2010. With this sale, the Case warranty was transferred according to the invoice from Bodensteiner(Vol I-App436).

While driving the tractor from the dealership, Cannon contacted Windridge, also a Case dealership to establish that the warranty did transfer and that its terms covered the powertrain for 60 months or 5,000 hours

which ever occurred first(Vol I-App271). At the time of its acquisition by Cannon, it had been used 2,590 hours(Vol I-App271,436).

Between October 6, and sometime in November, 2010, Cannon was able to use the tractor for 190 hours(Vol I-App272). At that point, it broke down. It was repaired by Windridge over the winter of 2010 and early 2011, and returned to Cannon(Vol I-App272). In October, 2011, the transmission overheated again and the tractor was returned to Windridge and remained there for the balance of 2011. During that time there was testing and intervention by Case's service representative, Hillen. Also extensive testing and work was done by the employees of Windridge(Vol I-App272). A decision was made to replace the rear housing with a used rear housing. This was approved by Case and plan administrator, EPG and was accomplished(Vol I-App334-335). After this was done, on further testing, there were erratic changes in the temperature in the transmission, nonetheless, Hillen, Windridge employees decided to return it to Cannon(Vol I-App335).

Cannon started using the tractor again in April, 2012 and logged 86.2 hours. Then the transmission overheated, the brakes failed completely and the tractor required an emergency stop(Vol I-App272-273). Since that date the tractor has not been used nor usable(Vol I-App273).

Case's field representatives, Kolb and Hillen were intimately involved in all of the failures and troubleshooting solutions utilizing Case's factory's expertise in Racine, Wisconsin through "ASIST"(Vol I-App310,325-329, 340-350,377). Ultimately Case's personnel were unable to come up with a solution for the repair of the tractor(Vol I-271-274,319,336-337,339). Case paid Windridge directly the sum of $14,000 in September 2012, for repairs on Cannon's tractor which were not channeled through EPG(Vol I-App317).

Later in 2012, Hillen discussed the possibility of Case providing Cannon with another tractor for his use and trying to get an engineer to further analyze the problem with the Case 305 tractor(Vol I-App272-317). Upon receipt of Cannon's attorney letter of 9/18/2012 Case and Windridge stopped work immediately(Vol I-App276,314-315).

Cannon never had any contacts with EPG or its representatives prior to filing suit. He was unaware of its existence as the administrator of the warranty plan(Vol I-App273). Since there were no further suggestions for how to repair the tractor which appeared unreparable, no further work was performed and the tractor has sat unused and unusable since April of 2012(Vol I-App274).

Per Case

Case attached Cannon's pleadings, the Case IH commercial equipment purchase protection plan for the powertrain marked as Exhibit B, a certificate which states it applicable to the instant Case 305 tractor, Cannon's answer to interrogatory #8 indicating he claims damages for lost income and emotional distress to its first MSJ(Vol I-App147-208). In its second and supplement motion re: claims of breach of express warranty and fraudulent concealment/non-disclosure, it attached a document marked as Exh A entitled "Case IH warranty and limitation of liability North American Agricultural Equipment" (Vol II-App814-815). There is nothing in this document that identifies it as a part of the original purchase of the Case Magnum 305 tractor purchased by Gansen Pumping and pleadings.

ARGUMENT

I. Did the Court err in awarding summary judgment to Bodensteiner on claims of fraudulent misrepresentation/fraudulent non-disclosure, breach of express and implied warranties, breach of implied covenant of good faith and fair dealing and for the remedy of equitable rescission?

Scope of Review/Preservation of the Issue

Appellate review of a grant of summary judgment is for correction of errors at law. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law, I.R.Civ.P. 1.981(3), Clinkscales v Nelson Sec. Inc, *Id840-1.*

The issued was preserved by pleading the causes of action and resisting Bodensteiner's MSJ on all claims. This was followed by a timely appeal.

Discussion

A. Fraudulent Misrepresentation/Fraudulent Non-disclosure

To recover for fraudulent misrepresentation there must be proof of:1) a representation to the plaintiff; 2)that the representation was false; 3)the representation was material; 4)that the defendant knew the representation was false or acted in reckless disregard of its falsity; 5) the defendant intended to deceive the plaintiff or had reason to expect that the plaintiff would act or refrain from acting in reliance on the representation; 6)plaintiff acted in reliance on the truth of the representation and was caused damage, Beck v Capalis, 302 NW2d 90(IA 1991), Restatement 2nd of *Torts*, §526 Comments c,d,e,&f and §527,529 and 530(1977). Proof of nondisclosure differs from fraudulent misrepresentation in that there must be a duty to disclose information material to the transaction and the defendant must have knowingly failed to disclose the information, Restatement 2nd of *Torts*§551(1977). This duty to disclose arises if: 1)the defendant has

previously made an incomplete or ambiguous statement and knows that additional information should be revealed to clear up the problem; or 2) if a previous false representation was not made with the expectation that it would be acted upon but its subsequently becomes apparent that the other is about to act in reliance upon it; or 3)if the non-disclosure relates to facts basic to the transaction and the defendant knows the other is about to enter into a contract under a mistake and because of the relationship between them, the custom of the trade or other objective circumstances would he reasonably expect a disclosure of those facts. Cannon asserted that the information provided by Roger Monroe and the mechanic, Neal from Clermont, about the tractor being fit, ready to go, having been in the shop and inspected are material misrepresentations upon which he relied for his decision to buy the tractor without conducting an independent inspection. He was forced to buy the tractor without seeing it because Roger Monroe refused to bring the tractor from Monticello to Clermont without Cannon's commitment to purchase it. Bodensteiner argued that Cannon did not rely on it for assurances that the tractor was in suitable mechanical condition to perform the function of hauling and spreading manure, but instead relied on his friends, the Mitchells who had Case IH tractors. There is a dispute of fact on this point with Cannon indicating he relied on Monroe. There is no

showing that the Mitchells specifically knew of the purchase of the Case 305 tractor or anything about its specific suitability. Bodensteiner also argues that no misrepresentation was made because it cannot be proved that Monroe knew the tractor was a lemon and it cannot be proved that he intended Cannon to rely on his misrepresentations as to the tractor's merits. There is dispute of fact on these points. Clearly Monroe wanted to sell a tractor in Bodensteiner's inventory to Cannon. Further Cannon indicated that any inspection of the tractor, however cursory, would have revealed the broken off and rusted bolts in the turbo and that there is no evidence despite the representations by Monroe that anyone at the Monticello dealership looked at the tractor, got it into the shop, inspected it or tested it in any manner. The only factual affidavit presented by Bodensteiner was a cursory self-serving affidavit authored by Monroe in which he indicates: 1)that he never made a false representation to Cannon about the tractor; 2)that the tractor operated appropriately and showed no signs of operational problems to his knowledge; and 3)that when he inquired of the Bodensteiner staff at Monticello no one indicated any knowledge of a defect or mechanical problem with the tractor (Monroe affidavit pg2). Interestingly he never indicates in his affidavit that the tractor was inspected or in the shop and ready to go as represented to Cannon. Cannon argued that Bodensteiner was

liable for non-disclosure because of his partial ambiguous statements of fact which would have been known to him to be misleading about the condition of the tractor; also if he made the statements without the expectation that they would be acted upon, he would have known Cannon was purchasing the tractor was before it was trucked up that he would not have the opportunity to examine it and would thus be acting in reliance on any previous misrepresentations to his detriment. Finally, because of his relationship with Cannon, he would have been aware that Cannon was relying on him for basic facts about the transaction and would reasonably expect a disclosure of information about the true condition of the tractor. Finally Monroe, in his deposition, as set forth in Vol I-App590-592, indicates the care which is customarily used by Bodensteiner Implement in taking the equipment in on trade to inspect and determine its condition. Monroe never indicates that he asked Phil Kluesner, the salesman from the Monticello dealership who took it in on trade-in whether the tractor had been inspected, was in the shop or was in good condition. However he does indicate that he told Cannon that the tractor was in good condition. The court granted summary judgment finding that there was no proof that one or more of the Bodensteiner employees made a false misrepresentation to Cannon, thus eliminating liability on either fraudulent misrepresentation or fraudulent disclosure. This

decision was in error as they were based on an improper determination of credibility.

B. Breach of Express Warranty/Implied Warranties of Merchantability and Fitness for a Particular Purpose

Proof of express warranty requires: 1)that defendant selling the item expressly warranted that it was in good condition; 2)that plaintiff made the purchase relying on that warranty; 3)that the tractor did not conform to the express warranty; 4)that the breach of the express warranty was the cause of the plaintiff's damage, §554.2313, Jacobson v Benson Motors Inc, 216 NW2d 316(IA 1974). Bodensteiner argues a failure to prove this cause of action because no express warranty was made by Monroe and he told Cannon that there were no warranties on the tractor except the Case warranty. These are matters of factual dispute. It also points to the phrase in fine print on the receipt for Cannon's tractor and $1,000, which states: "There is no warranty on used products". There is no specific UCC provision regarding disclaimer of express warranties. In Limited Flying Club Inc v Wood, 632 F2d 51(8th Cir (Iowa 1980)), the court held that disclaimer of implied warranties combined with the statement that the airplane was being accepted as "as is" was insufficient to disclaim the express warranty based on the log book for the airplane which was provided in addition to the form contract at the time purchase of the used airplane. Accordingly, a fine

print statement in the delivery or receipt of Bodensteiner does not cancel express warranties made to Cannon by Monroe. See also Stream v Sportscar Salon Ltd, 91 Misc2d 99 (NY 1997) (Disclaimer of all warranties is ineffective when accompanied by a "one year mechanical guarantee" as documents are construed against the seller). Further, there is a factual dispute as to whether this receipt was delivered after the purchase agreement had already been made. Cannon indicated that it had. If that is the case, then the disclaimer does not form a part of the purchase agreement and since it significantly alters terms of the purchase agreement, it is not accepted as a later addition to the terms of the contract, §554.2207(2)(b), Turner v Kunde, 128 NW2d, 196,198(IA 1964), Bruce v ICI Americas Inc, 933 FSupp 781 (S.D. IA 1996), Keith E. Meyers Enterprises, 296 NW2d 772(IA 1980). Bodensteiner also counters that Monroe's statements were opinion rather than express warranties. This would ordinarily be considered a question of fact to be determined by the factfinder, not as a matter of law, Peters v Lyons, 168 NW2d 759,763(IA 1969), Tralon Corporation v Cedar Rapids, Inc, 966 F.Supp 812 (N.D. IA 1997) page 826, Gillette Dairy Inc v Hydrotex Indus. Inc, 440 F.2d 969,974(8th Cir 1971). It was not appropriate to grant summary judgment on this claim.

Cannon also claims that there were implied warranties of merchantability and fitness for a particular purpose. Per §554.2314, an implied warranty of merchantability exists for all goods unless it is properly excluded pursuant to §554.2316. This implied warranty is based on a purchaser's reasonable expectation that goods purchased from a merchant will be free from significant defects and will perform in a way that the goods of that kind should perform, VanWyk v Norden Laboratories Inc, 345 NW2d 81,84(IA 1984). Bodensteiner does not argue that the tractor was merchantable just that the disclaimer was valid. Per §554.2315, an implied warranty of fitness for a particular purpose exists when the seller, at the time of the contract, has reason to know of the particular purpose for which the goods are being used and that the buyer is relying on the seller's skill or judgment to select or find suitable goods. Bodensteiner again argues that it has a valid disclaimer of this implied warranty. Per §554.2316 a disclaimer of the implied warranty of merchantability can be oral or written. If written, it must be conspicuous pursuant to §554.1201(10) which indicates: "A term or clause is conspicuous when it is so written that a reasonable person against to whom it is operate ought to have noticed it". The disclaimer relied upon is in the receipt signed by Cannon indicating that he received the Magnum305 tractor, the consideration paid was trade-in plus $1,000 and the

existence of a Case warranty. The question is whether his document came before or after the sales transaction was agreed to. Cannon is claiming that it was executed after the fact. Bodensteiner is arguing the opposite. This presents a factual dispute. Cannon also indicated that the disclaimer was not conspicuous. The question of whether a disclaimer is conspicuous, which is required for a warranty of merchantability if it is in writing and is required for a warranty of fitness for a particular purpose which must be in writing and conspicuous, is a question for the court, Sharp v Tamko Roofing Products Inc, 695 NW2d 43(Table)(IA App 2004), pg 4. The court briefly observed that the written agreement between the parties disclaimed both the express warranty and also effectively disclaimed both implied warranties. It does not specifically make a finding regarding conspicuousness of the disclaimer. Cannon argued that it was not conspicuous and was ambiguous in its context. Since there were no factual findings with respect to these items, the case will need to be reversed and remanded for further findings per Sharp.

C. Breach of Implied Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing is imposed as a duty in every contract governed by the UCC §554.1304, §554.2103. Section 554.1201 defines good faith as honesty in fact and the observance of

reasonable commercial standards of fair dealing, Team Two Inc v City of Des Moines, 334 NW2d 82(Table)(IA App 2013) pg 5. Bad faith may consist of dishonesty in either overt actions or inaction. The underlying principle is that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Bodensteiner claimed it was acting in good faith in a self-serving conclusory statement. The court found that this duty was not breached because Bodensteiner did not have knowledge of any tractor defect. There is a dispute of fact as to what was said between Monroe and Cannon. If Cannon's version of facts is accepted as true, it is clear that Monroe acted, at a minimum, with reckless disregard for the condition of the tractor and that this dishonesty by either action or inaction, destroyed the benefit of Cannon's bargain. It is a question of fact which it should not have been determined by the court.

D. Claim for Equitable Rescission

The remedy of equitable rescission, which places the parties back in the positions they had before the contract was consummated, is appropriately founded upon proof of fraudulent non-disclosure, Thakur LLC v Maha-Vishna Corp, 826 NW2d 515(Table)(IA App 2012). It is also appropriate on proof of fraudulent misrepresentation, City of Ottumwa v Poole, 687 NW2d

266(IA 2004). Further, per §554.2608, revocation of a contract is allowable if the goods turn out to be non-conforming in a way that substantially impairs their value and the non-conformity is one which would be difficult to discover before acceptance or if the non-conformity was hidden by seller assurances, Campbell v Agfinder Iowa-Nebraska, 683 NW2d 126(Table)(IA App 2004).

Rescission is also an appropriate remedy if the disclaimer of warranties is found to be unconscionable based on the factors of assent, unfair surprise, notice, disparity of bargaining power and unfairness of result, C&J Fertilizer v Allied, 227 NW2d 169(IA 1975). Finally, rescission is also an appropriate remedy if the Case warranty for repair is found to fail of its essential purpose per §554.2719, Midwest Hatchery & Poultry Farms Inc v Doorenbos Poultry Inc, 783 NW2d 56(IA 2010). The court found that equitable rescission was not appropriate because there was an adequate remedy at law for money damages citing SDG Macerich Properties LP v Stanek Inc, 648 NW2d 581(IA 2002). The case is not on point. It presents the issue of, "whether equitable relief is available when a party, as the result of forgetfulness, untimely exercises its right of a lease renewal option.", *Id585*. The court's holding was that equitable relief is not available to a commercial party under these circumstances, *Id589*. The case is not based

on any of the theories argued by Cannon as grounds for equitable rescission; to the extent that the court has ruled out some of those grounds, this is an implied ruling against Cannon, however it did not rule out all of the grounds that he argued.

The court also failed to grant a continuance in the event that it felt that there was insufficient information about the knowledge of the Clermont dealership personnel about the Case 305 so that more depositions could be taken. Review of this issue is for abuse of discretion, Bitner v Ottumwa Community School District, 549 NW2d 295,302(IA 1996). Such a continuance if supported by an affidavit should be allowed to prevent a party from "being unfairly thrown out of court by a premature summary judgment motion.", Iverson v Johnson Gas Appliance Co, 172 F3d 524,530(8th Cir 1999). The rule should be applied liberally, U.S. ex rel Bernard v Casino Magic Corp, 293 F3d 419,426(8th Cir 2002), National Assurity Corp v Dustex Corp, 291 FRD 321(N.D. IA 2013). The court did not give any specific reason for its denial of the request to postpone, however it also did not find the record insufficient with respect to information about what the Monticello dealership knew concerning the tractor. Accordingly, the cause of action should not have been summaried out.

Issue II: Did the Court err in awarding summary judgment to EPG on claims of breach of contract?

Scope of Review/Preservation of the Issue

This scope of review and preservation is the same as Issue I above.

Discussion

A. Re: EPG's liablity for outstanding expenses unsubmitted and unpaid

The "Case IH Commercial Equipment Protection Plan" covers the powertrain which includes the defect of the overheating transmission causing failing brakes. Its terms and conditions define the "plan"as:

> "The purchase protection plan, in respect of the goods, sold by the provider to the customer in return for a payment that is non-refundable to the extend permitted by applicable law".(Vol I-App185)

The "provider" is defined as EPG Insurance, Inc., and the "customer" means,

> "The purchaser of the plan, or an assignee thereof as expressly permitted hereunder".(Vol I-App185)

At §3 it indicates:

> "The protection under the plan applies, exclusively, to specified new or used goods sold and registered by authorized CNH Dealerships in the United States and operated exclusively in the United States..." (Vol I-App185)

At §5, the plan provides for payment for repairs to the goods for its failure due to defects and parts during the term of the plan after the expiration of the term of any applicable manufacturer's base warranty, in respect to DEFECTS IN THE GOODS ARISING AFTER SUCH EXPIRATION

(emphasis added by Appellant)(Vol I-App185). At ¶23 of the plan it indicates:

> "The remedies of having a defect in material or workmanship repaired or having defective materials replaced at a service center authorized by the provider under the terms and conditions of the plan are the customer's exclusive remedies under the plan and are in lieu of any other remedy or remedies otherwise available."(Vol I-App187)

At ¶29 it indicates:

> "If the provider pays for repairs under this plan and the customers has also repaid for the same repairs by someone else, the customer's payment will become the providers property up to the amount that the provider paid for the repairs."(Vol I-App187)

It is Cannon's position that the contract is not limited to payments for which reimbursement is sought during the period of the contract. The coverage relates to the period in which the parts or equipment or tractor becomes defective. It is also Cannon's position that the contract promises repair, not just payment for repairs that are ineffective. Cannon claims that he has $6,000 of expenses which were not submitted by Windridge during the term of the warranty for oil, filters, etc. which were occasioned by the overheating of the transmission. EPG, in its resistance, never argues whether the claimed out-of-pocket expenses are payable under the plan, but merely that because Windridge did not submit the expenses to it they do not have to pay them.

Per ¶5 the protection under the plan to repair and replace is for defects that occur during the term of the plan after expiration and the term of the

applicable manufacturer's base warranty. Accordingly, it is the date upon which the defects appear that triggers liability under the plan, not when payments are requested. The trial court found it has sufficient information to determine the facts as a matter of law that the expenses requested by Cannon are ordinary maintenance not occasioned by failure of the powertrain (Vol I-App137)[4]. This was not a position asserted by EPG and there is insufficient information in the record to determine whether the filter, oil and fluids paid for by Cannon were necessitated by overheating of the transmission thus payable under the plan or regular maintenance thus not payable under the plan(Vol II-App688-690). Summary judgment should not have been granted.

B. As to EPG's liability for failure to effectuate repairs

EPG claims it has no liability for the actual repairs. It is just paying for them if reimbursements are requested. By the terms of its plan, EPG is clearly tied to Case as the seller of goods and the contract clearly applies to goods as this is a term frequently used in the plan. Further it is clear that EPG is acting as an agent for Case for supervising and paying for repairs to its equipment. It should be noted that despite the explicit terms of the plan, EPG paid for repairs during the manufacturer's base period in 2009. It can be

[4] The trial court erroneously found that AMT paid repair expenses. This entity was dismissed from the case due to its agreement pertaining to a different tractor(Vol I-App139).

held responsible as an agent for the manufacturer, Case, in addition to having Case being responsible under the warranty if the agency exists, Bauman v Nutter, 328 NW2d 354,357(IA 1982), Restatement 2nd *Agency* §7 (1958). Agency may be implied by the parties' words or conduct and the circumstances of the particular case, Smith v Iowa Liquor Commission, 169 NW2d 803,811(IA 1969). Cannon argues that EPG is responsible for its failure to repair the tractor during the term of its extended protection plan. If it is not held responsible then the protection is meaningless. Other jurisdictions have analyzed repair warranties sold with the sale of goods, either explicitly or impliedly under UCC concepts. In Coryell v Lombard Lincoln-Mercury Merkur Inc, 544 NE2d 1154(Ill App 2nd distr 1989), a repairer and issuer of a "lifetime service guaranty" was held liable for its warranty when its repair failed to be a permanent solution to the problem. The court found that there was a prima facie case for breach of an express warranty using the terminology of UCC article 2. In Giarratano v Mitas Muffler, 166 Misc.2d 390, 630 N.Y.S.2d 656(NY 1995), an issuer of a brake pad warranty who interpreted its warranty to require a customer to initially pay not only for the brake pads but for replacement of the entire brake system in order to qualify for the warranty, had issued a warranty that failed of its essential purpose per UCC §2-719(2) even though the repairer was not

providing parts but providing the repair service and warranty. EPG could be held responsible under a similar theory in its own right or as the agent for the manufacturer, CNH who drafted the extended protection plan and chose EPG to be the contract administrator. Thus, anyone who purchased an extended protection plan had the terms of the plan and the administrator of the plan selected by Case for him. Cannon asserts that §554.2719 applies to the extended protection, warranty contract administered by EPG because it is essentially a contract for goods, although it could be considered a mixed contract for goods or services. The UCC applies to contracts where their principal purpose is the sale of goods even though services are involved or required, Design Data Corp v Maryland Casualty Co, 503 NW2d 552(NE 1993), Brandt v Boston Scientific Corp, 792 NE2d 296(IL 2003), RMP Industries Ltd v Linen Center Center, 366 NW2d 523,528(IA App 1986), Richards v Midland Brick Sales Co Inc, 551 NW2d 649(IA App 1996). Section 554.2719(2) indicates: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." This has been interpreted in Iowa to allow any other existing remedy to replace that of the one that fails for its essential purpose, Midwest Hatchery & Poultry Farms Inc v Doorenboos Poultry Inc, 783 NW2d 56(IA App 2010). The purpose of the extended protection plan is

to sell goods. CNH's tractor, and replacement parts. EPG counters this theory of liability by claiming it is not a "merchant" because it does not deal in goods. However, if the contract at issue is considered to be a mixed contract with a predominant purpose of sale of goods then it would be a person who deals in goods and would be a merchant pursuant to 554.2104(1). Further the term "merchant" can extend to any person who holds himself out as having knowledge or skill peculiar to the goods involved or an agent for such a person. In order to supervise and approve repairs to the equipment, EPG must certainly have knowledge peculiar to the tractor and its repair. The "goods" are the tractor, parts or replacement parts.

As an additional argument, EPG joins Bodensteiner stating that there was not proof that the tractor is defective. This does not have to be proved at this stage of the proceedings. However Cannon's evidence that despite serial repairs, the equipment does not operate correctly or continues to fail, even in the absence of either expert testimony or a specific identification of the defect causing the recurrent failures, has been deemed to be sufficient proof of a defective good, Stream v Sportscar Salon Ltd, 91 Misc 2d 99, 397 N.Y.S.2d 677(NY 1977).

In conclusion Cannon claims that EPG was responsible for his unreimbursed expenses and that its responsibility extends beyond that due to

the failure of the protection plan to fulfill its "essential purpose" should not have been resolved adversely as a response to the motion for summary judgment.

Issue III: Did the Court err in awarding summary judgment to Case on claims of negligent design, manufacture etc, breach of express warranty and fraudulent concealment/nondisclosure?

Scope of Review/Preservation of the Issue

This scope of review and preservation is the same as Issue I above.

Discussion

A. Whether the economic loss doctrine should apply to eliminate the negligence claim.

Case argued that the economic loss doctrine should prevent Cannon from maintaining causes of action for negligence since his damages are loss of the value of the tractor as well as the consequential damage of loss of profits from his manure pumping business.

Negligence is an important claim for Cannon because he was not in privity with Case and had no opportunity to negotiate the remedies in the event of acquiring a defective Case tractor. As a general proposition, the economic loss doctrine bars recovery in negligence when the plaintiff has suffered only economic loss, St. Malachy Roman Catholic Congregation of Geneseo v Ingram, 841 NW2d 338,351(IA 2014). The public policy behind this court adopted doctrine is:

> ". . . intended to prevent the tortification of contract law. It is also intended to encourage parties to enter into contracts and to protect parties from being responsible for a remote economic losses."

Annette Holdings Inc v Come & Go, LC, 801 NW2d 499,503-4(IA 2011). The rationale for the adoption of the doctrine involves two competing concerns, 1)the encouragement of parties entering into contracts to protect themselves through contract from defects in the products being purchased, and 2)to protect manufacturers from being responsible for remote economic losses. Exceptions to this doctrine have been developed in the event of personal injury or damage to other property, not the product itself, Saratoga Fishing Company v J.M. Martinac & Company, 520 U.S. 875,884(1997). The doctrine was initially developed to avoid the application of the doctrine of strict liability in tort to losses of the product itself, not necessarily to prevent an action for negligence in a product liability context, Seely v White Motor Co, 403 P2d 145,149(CA 1965). While Iowa appears to apply the doctrine even to parties who are not in privity and therefore who have no ability to negotiate a contractual remedy, other jurisdictions have refused to extend the doctrine to injured parties who are not in privity of contract with the manufacturer. See Iowa cases, Richards v Midland Brick Sales Co Inc, 551 NW2d 649, 650-2(IA App 1996), in which the Court of Appeals found that the economic loss doctrine barred a tort claim by a homeowner against a

brick supplier even though they were not in contractual privity, and Tomka v Hoechst Celanese Corp, 598 NW2d 103, 106-7(IA 1995), when the doctrine was applied to bar a cattle feeder from recovering from the manufacturer of synthetic growth hormones even though they were not in contractual privity but were purchased through local veterinarians. There has been some inconsistency in the application of this doctrine in Iowa as it relates to consequential damages such as the lost profits claimed by Cannon. In Manning v International Harvester Company, 381 NW2d 376(IA 1985), the court allowed the plaintiff to pursue a negligence claim against the manufacturer of a defective seed drum whose use caused crop damage. In VanWynk v Norden Laboratories Inc, 345 NW2d 81,88(IA 1984), a cattle owner recovered damages for sick/dead cattle caused by a defective vaccine.

In contrast in Florida, the court has limited the application of the economic loss doctrine only to those situations where there is contractual privity, AFM Corp v Southern Bell Telephone & Telegraph Co, 515 So2d 180,181(Fla. 1987). In Rinehart v Morton Buildings Inc, 305 P3d 622,626(KA 2013), in *dicta*, the court reaffirmed prior decisions to apply the economic loss doctrine only to a party who was in contractual privity with the party being sued who would consequently have the ability to bargain for contractual protections. Likewise Arizona, in Sullivan v Pulte Home Corp,

306 P3d 1,2(AZ 2013), limits the application of the economic loss doctrine to preclude tort claims only for parties in contractual privity. In accord see also Tilot Oil LLC vs BP Products of N.A., 907 FSupp.2d 955(E.D. Wis 2012), Kreiscrs Inc v First Dakota Title Limited Partnership, 852 NW2d 413,421-2(S.D. 2014). See also *The Boundary-Line Function of the 'Economic Loss Rule'*, 66 Wash & Lee L.R., 523 (Spring 2009).

When the economic loss doctrine was initially adopted by the Iowa Supreme Court it applied only to prevent consumers from recovering in strict liability, not negligence, Nelson v Todd's Ltd, 426 NW2d 120 (IA 1988). In Bushman v Cuckler Bld, 421 NW2d 145(IA App 1988), a purchaser of a hog building was permitted to sue in both contract and tort. In Richards v Midland Brick Sales Company Inc, 551 NW2d 649(IA 1996), a home owner suing her contractor and brick supplier was not permitted to sue in tort for crumbling bricks because she was in privity and could sue in contract. However in Tomka v Hoechst Celanese, 528 NW2d 103(IA 1995), the Supreme Court applied the economic loss doctrine to bar a nonprivity buyer for suing in tort. The extension of the judicially created economic loss doctrine to individuals who are not in contractual privity to bar negligence claims violates Article I, §1 of the Iowa Constitution which provides:

> "All men and women are, by nature, free and equal and have certain inalienable rights -- among which are those of enjoying and defending

> life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness."

This article has been interpreted to allow modification of the common law to abrogate a right of recovery only if such an abrogation constitutes a reasonable exercise of police power, May's Drug Stores v State Tax Commission, 45 NW2d 245,328-9(IA 1951). This section, along with the Due Process Clause of the U.S. Constitution, the 14th Amendment §1, is not an absolute guaranty of any certain property right, however in order to deprive a citizen of a property right previously vested in the common law, a subsequent regulation or restriction must be justifiable and based on a reasonable exercise of the police power for the public good, Stoner v Iowa State Highway Commission, 287 NW 269(IA 1939). This concept was recently applied in the case of Gacke v Pork Xtra LLC, 684 NW2d 168,172-4(IA 2004), to overturn a statute which gave animal feeding enterprises a right of immunity from suit under certain circumstances for creating a public nuisance. In doing so, the court observed that there is a presumption that a statute is constitutional *Id177*. It is unclear whether such a presumption would be applicable in the case of a judicially created limitation on the common law right to recovery in tort in order to preserve the boundaries between tort law and contract law. In any event, the case indicates that the court must examine the reasonableness of the challenged limitation to the

common law to determine whether it is constitutional, *Id177*. Cannon asserts that the deprivation of his right to protect himself and recover for a defective product is a deprivation of a property right within the meaning of Article I, §1 under the circumstances of his case. In the case of the statute challenged in Gacke, The court identified the purpose as:

> The purpose of this section is to protect animal agriculture producers who manage their operations according to state and federal requirements from the cost of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

In striking down the law, the Iowa Supreme Court found that the means by which the statute accomplished its objections were not "reasonably necessary" and were "unduly oppressive", *Id178*. In the current case, the original rationale of the economic loss doctrine was to avoid allowing litigants who had the opportunity to negotiate contractual remedies from circumventing the limitations in their contracts by bringing a negligence claim. This rationale would apply only in cases where there is contractual privity. The Iowa Appeals' courts, in extending the application of the doctrine beyond the case where a party had contractual privity, cite an interest in protecting manufacturers from being responsible for remote

economic consequences. This rationale would not apply to the circumstances of the current case where the manufacturer, Case IH, has an extended protection plan available for purchase by the original customer and transferable to a subsequent purchaser of the used product. Clearly the manufacturer anticipated liability, at least in some context, to a subsequent purchaser. It is reasonably foreseeable in this context by the manufacturer that it might be liable to a subsequent buyer for defects in its products. Considering the manufacturer's situation and that Cannon had no opportunity to bargain specifically under contract law for his remedy, equity should prevent the application of the doctrine to the facts of this case. Accordingly, the application of the judicially created doctrine to the facts of this case constitutes a violation of Article I, Section 1 and the Due Process Clauses of the U.S. and Iowa Constitutions as it relates to protection of property. For this reason, the motion for summary judgment with respect to the negligence claim should have been denied not granted by the court(Vol I-App142). In accord with this position is the dissent in Annette Holdings Inc v Kum & Go, 801 NW2d 499, 508-513(IA 2011). See also *Applying Economic Loss Doctrine to Article 2 Transactions: A doctrine at a loss,* St. Thomas Law Review, Fall 2012.

B. Whether Case is responsible for the repair warranty encompassed in the "Case IH Commercial Equipment Purchase Protection Plan" and if so, whether it fails of its essential purpose and opens Case to liability for Cannon's damages.

Cannon believes that the available facts would indicate that Case is participating as an entity involved in the offer and administration of the extended purchase protection plan for the powertrain on Cannon's tractor. The plan itself is called a "Case IH Commercial Equipment Purchase Protection Plan". It is advertised by Case and offered in connection with its sale of newly manufactured tractors, including the Case Magnum 305. It covers the powertrain for a period up to 60 months or 5,000 hours, whichever occurs first, including the manufacturer's base bumper-to-bumper warranty, which covers the first two years. It requires all repairs to be done by Case dealer authorized mechanics and that all parts used by Case manufactured parts. Case supervises and evaluates the mechanics for competence periodically through its field service representatives. The Case service representatives trouble shoot repairs, offer their own advice and if necessary get advice from Case manufacturing engineering personnel regarding the repairs during the life of this warranty. Although the language of the protection plan indicates that Case is to pay for repairs in the first two years and EPG in the remaining three years, EPG paid over $5,000 for Case for repairs on this tractor in the first two years and Case paid over $14,000 in

2011/2012 for repairs instead of EPG. Cannon believes that liability could be imposed on Case based on its joint venture with EPG to provide the warranty. Joint venture or joint adventure is defined as an association of two or more persons to carry out a simple business enterprise for profit or a common undertaking in which two or more persons combine their property, money, effort, skill or knowledge.

"As a rule a joint adventure is characterized by a joint proprietary interest in the subject matter, a mutual right to control, right to share in the profits and a duty to share the losses" 48 C.J.S. *Joint Adventures*, §2a, 30 AmJur, *Joint Adventure*, §1112, Farm Bureau Service Company of Harden County v Bavender, 217 NW2d 560,562(IA 1974). The factors which a trier of fact looks at to determine if there is a joint venture include a common undertaking, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits and a duty to share the losses. These are not elements and not all the factors are required to characterize an enterprise as a joint venture. A trier of fact may rely on one or more of these factors to determine a joint venture:

> "Despite the general acceptance of the criteria listed above, it has been said that courts have not laid down any very certain definition of what constitutes a joint venture, nor have they established a very fixed or certain boundary thereof, contenting themselves in determining whether the facts of a particular case constitute their relationship of joint venture".

Farm-Fuel Products Corp v Grain Processing Corporation, 429 NW2d 153,156(IA 1988). In this case the court upheld the finding of a jury of joint venture between an ethanol producer and a ethanol distillery designer. The court found pivotal facts included the exchange of technical information and business information relating to the manufacture, use and sale of alcohol and alcohol gasoline mixtures and a licensing agreement allowing the parties to share their know-how and experience for the purpose of developing and marketing an energy responsible process for the conversion of renewable resources to liquid motor fuel. The court identified that sharing technical know-how and jointly applying knowledge for a specific purpose were sufficient to constitute a joint venture. In Harold v Shagnasty's Inc, 690 NW2d 699(Table)(IA App 2004) pg7-8, the court indicated a question of whether a certain relationship constitutes a joint venture is a question of fact, which in that case was appropriately submitted to the jury. In this case the court should not have determined this issue as a matter of law, given the fact that there were some facts at this stage which would support the conclusion of a joint venture.

Alternatively, as indicated under the previous argument regarding EPG, there is evidence of an agency between case and EPG, being the agent of Case in the process of drafting its terms, offering it to Case customers

and its administration. Whether an agency exists, ordinarily is a fact question but there must be some evidence to support the conclusion that there is an agency before it will be submitted to the trier of fact jury, Chariton Feed and Grain Inc v Harder, 369 NW2d 777,789-90(IA 1985). An agency results from the manifestation of consent by one person, the principal that another the agent shall act on the former's behalf, subject to its control and that the agent consents to act as agent, Chariton,*Id789*. In deciding whether an agency exists, it is necessary to review the facts and circumstances surrounding the purported agent's activities to determine whether the purported principal exerts the requisite control over the purported agent so as to create an agency relationship, Waterhout v Associated Drygoods Inc, 835 F.2d 718,720(8th Cir MO 1987). In this case the grant of a summary judgment for failure to prove agency was reversed because viewing the evidence in the light most favorable to the non-moving party, the movant was not able to conclusively negate the possibility of control by the principal of the agent. In accord, Harrison v Rockwell Collins Inc, 2006 WL2981451(N.D. IA). In Peak v Adams, 799 NW2d 535(IA 2011), the Supreme Court reversed a summary judgment finding no agency between renters to impose liability for an injury sustained when the plaintiff assisted them in moving their belongings. It indicated that agency was in relation to

renting a U-Haul truck which caused the injury to the plaintiff when he was helping with the move. The court ruled that viewing the facts in the light most favorable to the resisting party, there remained a genuine issue of material fact as to whether there was an agency relationship created by renting the U-Haul although only one individual's name was on the lease. In this case, the majority of the control with respect to the extended protection plan was exercised by Case. It determined the form of the warranty, the existence of the warranty, it offered the warranty to purchasers of its product and advertised it in connection with sales of its product, it manufactured the parts that would be used for repairs, it supervised the mechanics performing the repairs and trouble-shot repairs as well as transmitting information from its manufacturing engineers as necessary for directing how repairs should be done. The only matter over which EPG had control in relation to the warranty was in most case the payment for repairs after expiration of the two-year bumper-to-bumper warranty offered by Case. However, even this aspect of the warranty was controlled on occasion by Case.

In conclusion, there was sufficient evidence to generate a fact question on Case's role in the extended protection plan, either on a joint venture theory or an agency theory.

The next question is whether the repair remedy failed of its essential purpose pursuant to Iowa Code §554.2719. The protection plan is a contractual agreement to remedy defects in "goods" sold as defined in the UCC. Section 554.2719(2) indicates, "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." Cannon's argument is that the sale of this tractor to Gansen Pumping, which incorporates both the manufacturer's base warranty and the additional protection plan, both failed of their essential purpose since the tractor was a lemon and its defect, which prevented the tractor's safe use, rendered it unrepairable. The Iowa Code Annotated commentary for §554.2719, states:

> " . . . it is the very essence of a sales contract that at a minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this article, they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract. . . . Where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this article."

Since the tractor was unrepairable, the warranty of the workmanship to be free from defects, followed by the remedy of repair and replacement in both the manufacturer's base warranty and the extended protection plan, fail of their essential purpose. Another way to state the argument is the existence of

the warranties themselves implies that the tractor, if it develops material defects, will be repairable. This was clearly not the case for Cannon's tractor. See Midwest Hatchery & Poultry Inc v Doorenbos Poultry Inc, 783 NW2d 56 (IA App 2010). In this case the court found that repair or replacement was not sufficient to give the purchaser a viable remedy and thus it failed of its essential purpose. Upon reaching this conclusion, courts then fashioned their own remedy as long as it is available in the UCC. It is generally accepted that an exclusive repair remedy for an unrepairable product fails of its essential purpose as it amounts to no remedy: Young v Hessel Tractor, 782 P2d 164(OR App 1989), Goddard v General Motors Corp, 396 NE2d 76(OH 1979, Cooley v Bighorn Harvestor Systems Inc, 812 P2d 736(CO 1991), *dicta* in Clark v International Harvestor Co, 581 P2d 784(ID 1978). This doctrine can also be applied to avoid any limitations on consequential damages, Select Pork Inc v. Babcock Swine Inc, 640 F2d 147 (8th Cir 1981), Cooley *Id.,* Hydronic Energy v Rentzel Pump, 2013 WL5797326 (NE App).

The failure of the purchase protection plan to meet its essential purpose is entirely within the control of CNH America LLC. It manufactured the lemon tractor, it supervised and provided replacement parts for all of the repairs and it was ultimately unable to repair the tractor

for any reasonable length of time from the first breakdown in October of 2008 through the last breakdown in April, 2012. Summary judgment should not have been granted on this claim.

C. Whether summary judgment should have been granted on the claim for fraudulent concealment/fraudulent nondisclosure by Case

Case's argued in its supplemental motion that it has not committed any fraud with respect to obscuring the statute of limitations and no such acts have been pled. Cannon agrees with both statements but they are beside the point. The fraudulent non-disclosure or fraudulent concealment cause of action is not limited to arguments related to the statute of limitations. Cannon has pled that the fraud relates to the failure to advise him that the purchase protection plan was worthless and failed of its essential purpose because the tractor was unrepairable. The existence of the plan implies that the tractor is repairable, at least based on the information known at the time that it went into effect in April of 2010. CNH America LLC had ample information at that time to indicate that the tractor was unrepairable and had a material defect which rendered it useless. See Wright v Brooke Group Limited, 652 NW2d 159, 174-6 (IA 2002) which adopts the Restatement of Second Torts §551 relating to liability for fraudulent nondisclosure. In *dicta*, in Bob McKiness Excavating & Grading Inc v Morton Buildings, 507

NW2d 405, 409 (IA 1993), the court adopts Restatement of Torts §550 regarding liability for fraudulent concealment. Section 550 indicates:

> "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the non-existence of the matter that the other was thus prevented from discovering."

Section 551 indicates:

> "One party who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the non-existence of the matter that he has failed to disclose, if . . . he is under a duty to the other to exercise reasonable care to disclose the matter in question."

In a case such as this, involving a business transaction, the duty arises: 1) if matters known to the defendant make it necessary to prevent his partial statement of facts to be misleading to provide further information; or 2) if the defendant subsequently acquires information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so. It might be that Case was unaware that its tractor was a lemon and unrepairable at the time of its initial delivery, but certainly by April of 2010, it would be aware that the existence of the purchase protection plan would imply that the tractor was repairable which would be misleading to either the initial purchaser or since the protection plan was transferable, a subsequent purchaser. See also Wright, *Id177*. Further, even

if the finder of fact should determine that Case is not liable as a party to the purchase protection plan, it could be held liable under Restatement of 2nd Torts §533, which indicates that:

> "The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation although not made directly to the other is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other and it will influence his conduct in the transaction or type of transaction involved."

See also Clark v McDaniel, 546 NW2d 590,592-4(IA 1996).

Plaintiff's counsel was unable to find a case that indicated that fraudulent non-disclosure or fraudulent concealment causes of action were only recognized in Iowa in connection with claims that the conduct led to missing the statute of limitations. Accordingly, the three cases cited by Case in its memorandum in support of its supplemental motion are not on point, Hammen v Iles, 834 NW2d 872, 2013 WL2368810 (IA App), Estate of Anderson v Iowa Dermatology Clinic PLC, 819 NW2d 408(IA 2012), and Christy v Miulli, 692 NW2d 694 (IA 2005).

Cannon agrees with the elements of this cause of action as set forth in Case's memorandum in support of its supplemental motion for summary judgment at page 8. These are: 1)Case made a false representation or concealed material facts; 2)Cannon lacked knowledge of the true facts;

3)Case intended for Cannon to act upon its false representations; and 4) Cannon relied on the false representation to his prejudice. The false representations or concealed material facts were the fact that the tractor was a lemon and unrepairable. This representation was made by the manufacturer by perpetuating both its base warranty and the purchased protection plan after April of 2010. By the time Cannon was purchasing the tractor in October of 2010, Case was certainly aware that the tractor was unrepairable. Cannon lacked the knowledge of this fact. Case intended for Cannon to act upon its false representation for the reason that it chose not to bite the bullet, recall the tractor and retract the misleading repair warranty. Cannon, in fact, relied upon the false representation to his prejudice. He purchased the lemon which was unrepairable and got very little use out of it. An analogous case is McLeod USA v Quest Corp, 469 FSupp2d 677 (ND IA 2007). A motion to dismiss claims of fraudulent concealment was denied because the pleading states that the defendant withheld information about the originating location of its long distance calls to the detriment of the local provider when allocating charges for the defendant's calls. Further Cannon incurred significant losses in connection with his business and expenses related to the rental of replacement units and expenditures for out-of-pocket maintenance, i.e. oil filters, etc., which would not have been necessary but for the

defective nature of the tractor and Case's fraudulent concealment/nondisclosure of it.

In summary, Case did not prove its entitlement to summary judgment on negligence, breach of express warranty or fraudulent concealment/fraudulent nondisclosure causes of action the case should be reversed and remanded.

CONCLUSION

The Appellate court should reverse and remand the case for trial on all counts as to all defendants.

REQUEST FOR ORAL ARGUMENT

Cannon request oral argument of this appeal.

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__s/Judith O'Donohoe_____ _____ November 16, 2015___
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